

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

HEARD BEFORE THE HONORABLE WILLIAM E. SMITH

CHIEF JUDGE

(Jury Trial)

Volume II

REDACTED

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7 FEBRUARY 2014 -- 9:00 A.M.

(Proceedings out of the presence of the jury as follows:)

THE COURT: Good morning.

MR. DONNELLY: Good morning, your Honor. I just have one housekeeping issue to bring before the Court. The Government has two, as I indicated yesterday, has brief witnesses before resting this morning. The first of those is a Department of Corrections witness, who I hope to introduce some written policies through. I believe there are three of them. I believe I miscommunicated this morning, your Honor, and one of those exhibits I only have my own copy here. I messed up. So we don't have extra copies at the moment. They'll be easily obtainable at the morning break, if that's okay with the Court.

THE COURT: That's fine. So that's all you have and then you intend to rest?

MR. DONNELLY: Yes, your Honor.

THE COURT: Okay. So Mr. Mann, your plan then?

MR. MANN: I'd make a JA motion after he rests. And after that, I spoke to Mr. Donnelly, if the Court approves what I'll do is I would call my client, but I would spend the rest of the day realistically playing videos through him with this sort of one item that I'd

1 like to place on the record.

2 Mr. Donnelly said, if I'm correct, he has no
3 objection. I wouldn't want that to interfere with my
4 ability to work with my client over the weekend on the
5 remainder of the direct, the remainder of the case.

6 THE COURT: So you don't anticipate you'll get
7 through that direct today, is that what you're saying?

8 MR. MANN: I can't imagine it, Judge, if we're
9 going to play the videos even at high speed.

10 THE COURT: Okay.

11 So Mr. Donnelly, do you have any objection to
12 that?

13 MR. DONNELLY: Absolutely none.

14 THE COURT: All right. So that's on the record
15 and I think you're fine then.

16 MR. MANN: Thank you.

17 THE COURT: All right. So if that's it then,
18 let's get the jury in.

19 (Proceedings in the presence of the jury as
20 follows:)

21 THE COURT: Good morning, ladies and gentlemen.
22 Welcome back. Good to see you this morning. I trust
23 everyone has abided by the instructions I gave you
24 yesterday. Nobody has done any independent research or
25 anything like that in this case. We're going to be

1 heading into the weekend. All the more important you
2 abide by the instructions as well as not having any
3 conversations.

4 We're doing well in terms of the timing of the
5 trial. So there may be one or two things this morning
6 that require me to send you into the jury room.
7 Hopefully, it will be around the same time as the
8 break; but, if not, I might need to do that. In a
9 trial there's some legal issues I always have to deal
10 with with the attorneys at various points so don't be
11 surprised if we do that. And I think we're on track in
12 terms of, as I said, the timing of the trial to be able
13 to complete the trial early next week. Okay?

14 So Mr. Donnelly, I think you're ready to call
15 your next witness?

16 MR. DONNELLY: Yes, your Honor. The United
17 States calls Christine Imbriglio.

18 CHRISTINE IMBRIGLIO, GOVERNMENT WITNESS, SWORN

19 THE CLERK: Please state your name and spell
20 your last name for the record.

21 THE WITNESS: Christine Imbriglio. That's
22 I-M-B-R-I-G-L-I-O.

23 THE COURT: Good morning, Ms. Imbriglio.

24 THE WITNESS: Good morning, Your Honor.

25 THE COURT: You may inquire, Mr. Donnelly.

MR. DONNELLY: Thank you, your Honor.

DIRECT EXAMINATION BY MR. DONNELLY

Q. Good morning, Ms. Imbriglio. Are you employed?

A. Yes, I am.

Q. Could you tell the jury how you're employed?

A. I'm employed by State of Rhode Island, Department of Corrections.

Q. And what part of the Department of Corrections do you work in?

A. I'm sorry? Can you repeat that.

Q. Sure. What part of the Department of Corrections do you work in?

A. I'm employed under Rehabilitative Services, the Division of Adult Probation and Parole.

Q. And so how long have you been with Adult Probation?

A. I have worked for the State of Rhode Island for 25 years; 18 years I have worked for the Department of Corrections, 9 years as a probation officer, 9 years as a supervisor and the last -- almost the last year has been as the acting Assistant Administrator.

Q. Let me start with this. Do you know the Defendant on trial, Gerald Silva?

A. Yes, I do.

Q. How long have you known Mr. Silva?

1 A. Approximately ten years.

2 Q. And are you familiar with the Department of
3 Corrections' policies and the like?

4 A. Yes, I am.

5 Q. And could you explain to the jury a little bit
6 about what is the role of a State of Rhode Island
7 probation officer, just in brief?

8 A. Sure. The role of the probation and parole
9 officer in the State of Rhode Island is a fine balance
10 between offender accountability, keeping the victim in
11 the community safe as well as insuring rehabilitation
12 of the offender. So it's a combination of law
13 enforcement and social work.

14 Q. And you're not sworn law enforcement officers,
15 however; is that correct?

16 A. No, we're not.

17 Q. Do you carry weapons?

18 A. We do not.

19 Q. In Rhode Island at least -- I know it's different
20 in other states, but in Rhode Island at least do you
21 have the power to arrest?

22 A. No, we do not.

23 Q. Okay. And do you investigate crimes?

24 A. We do not.

25 Q. And that -- you gave in summary fashion some of

1 the limitations on the role of a probation officer. Is
2 there a policy on that that you shared with us in this
3 case?

4 A. Yes.

5 Q. I'd like to show you, Ms. Imbriglio --

6 MR. DONNELLY: If I can approach the witness,
7 your Honor?

8 THE COURT: Yes.

9 Q. -- Government Exhibit 33. If you could just take
10 a brief moment to look at that.

11 Do you recognize that document?

12 A. Yes, I do.

13 Q. What do you recognize it to be?

14 A. These are the roles and functions of the adult
15 probation on parole officer.

16 Q. It's an official document of the Probation
17 Department?

18 A. That's correct.

19 MR. DONNELLY: Your Honor, I'd move Government's
20 Exhibit 33 full, please.

21 MR. MANN: No objection.

22 THE COURT: 33 will be full.

23 (Government Exhibit 33 admitted in full.)

24 MR. DONNELLY: Could I have a moment.

25 (Pause.)

1 MR. DONNELLY: Now, if we could bring up the
2 first page of that for the jury, please, Ms. Anderson.

3 Q. This is just showing you a computer copy of what
4 you just looked at, Ms. Imbriglio. And this is the
5 first page of the document we just looked at, correct?

6 A. Yes, it is.

7 MR. DONNELLY: Could we go to the next page,
8 please, Ms. Anderson.

9 THE COURT: Okay. We'll go back and make sure
10 all of the screens are working.

11 Q. So while we have the first page up, Ms. Imbriglio,
12 the title of this document is "The Roles and Functions
13 of the Probation and Parole Officer;" is that right?

14 A. That's correct.

15 Q. Sort of a listing of what probation officers do
16 and what they're not supposed to do, correct?

17 A. Yes.

18 MR. DONNELLY: And now, if we could go to page
19 two, please.

20 And Ms. Anderson, if we could expand on the
21 bottom half here that's in bold.

22 Q. I just asked you about this part of a probation
23 officer's job but as the first line of this section of
24 the documents says, "Some activities that PO's" -- what
25 does "PO" stand for?

1 A. Probation officers.

2 Q. -- "that probation officers in Rhode Island do not
3 do that are associated with POs in other
4 jurisdictions." In other words, Rhode Island probation
5 officers have a different role than maybe they in Texas
6 or that sort of thing; is that correct?

7 A. Correct.

8 Q. One of the limits is not -- you don't get to take
9 people into custody or carry any sort of offensive
10 weapon; is that right?

11 A. Yes.

12 Q. And probation officers are not to confiscate
13 contraband, illegal or illicit items. What's
14 contraband or illegal or illicit items?

15 A. Contraband would be something that is brought into
16 the institution that is not allowed to be brought into
17 the Department, drugs or weapons or anything that would
18 pose a threat to the safety of the department. And
19 illegal or illicit items are things that are against
20 the law.

21 Q. Would that include child pornography?

22 A. Yes.

23 MR. MANN: Objection.

24 THE COURT: Grounds.

25 MR. MANN: There's no evidence of that taking

1 place in this case.

2 THE COURT: All right. I'm going to overrule
3 the objection.

4 Q. And referring your attention to the one after the
5 one we just reviewed, this one right here, one of the
6 things Rhode Island probation officers do not do is
7 investigate criminal behavior; is that right?

8 A. Correct.

9 Q. If a probation officer sees child pornography, for
10 instance -- let me back up.

11 Do probation officers make home visits as a
12 regular part of your duties as a probation officer?

13 A. Yes.

14 Q. And if a court has ordered that regular searches
15 of that person's computer should be done for such
16 things as child pornography, how does that task that
17 the Court has ordered, a state judge typically, how
18 does that task get done? Do the probation officers
19 search the computer?

20 A. No, they do not. They're not authorized.

21 Q. They're not authorized?

22 A. The officers have not been trained and the
23 Department does not allow probation officers to do
24 searches of computers.

25 Q. And if, for example, you're on a home visit and

1 you see contraband, things that are just illegal to
2 possess, like drugs or child pornography, and a
3 probation officer sees it sitting on a table or on a
4 computer, what is the probation officer to do?

5 A. Probation officer is not authorized to confiscate
6 it or to seize it in any way, shape or manner. We have
7 to notify the police department; or if we're doing
8 joint home visits with a probation officer and a police
9 officer, the police officer takes jurisdiction and
10 takes over that.

11 Q. Now, are you familiar -- one second.

12 (Pause.)

13 Are you familiar -- does the Department of
14 Corrections Adult Probation and Parole have policies as
15 to research and public presentations?

16 A. Yes.

17 Q. And as to research, could you describe to the jury
18 what is the basic rules of the road, so to speak, that
19 the written policies of the Department of Corrections
20 provide for?

21 A. The research policy is to ensure that the research
22 that is being done is appropriate within guidelines of
23 HIPAA and that ensure that it's appropriate research
24 treatment being done consistent with the mission of the
25 Department.

1 Q. So some people do medical research? Is that why
2 you mentioned HIPAA?

3 A. Yes.

4 Q. And sometimes people do non-medical research,
5 correct?

6 A. Correct.

7 Q. The people doing non-medical research, is
8 permission of a supervisor required under the written
9 policy?

10 A. The policy spells out what the process is to do
11 research in the Department, yes. It begins with a form
12 that has to be completed and submitted to the
13 supervisor, who pre-approves that and then it gets
14 moved up the chain of command. It goes to the
15 Associate Director of Planning and Research.

16 Q. I'd like to show you what's been marked as
17 Government's Exhibit 38 for identification.

18 MR. DONNELLY: Your Honor, I'm going to show the
19 witness Government Exhibit 38. I don't believe
20 Mr. Mann has an objection. I would move it full.

21 MR. MANN: That's correct. No objection.

22 THE COURT: All right. 38 will be full.

23 MR. DONNELLY: Ms. Anderson, we don't have that
24 on the computer, right, at this point? Okay.

25 THE COURT: If it's full, you can use the ELMO

1 and that way the jury can see it.

2 (Government Exhibit 38 admitted in full.)

3 Q. I guess we're looking at half of the first page of
4 Government Exhibit 38, Ms. Imbriglio. Do you recognize
5 that?

6 A. Yes, I do.

7 Q. And is this the policy on research you were just
8 mentioning?

9 A. Yes, it is.

10 Q. Now, to get permission, is it done orally or does
11 the person have to fill out a form of some sort?

12 A. A form has to be filled out.

13 Q. And as to non-medical research, showing you what
14 has been marked as the policy appears to be 11 pages
15 long and then the forms come after that; is that right?

16 A. Yes.

17 Q. Showing you the first form that's a part of
18 Government's Exhibit 38, is this the form a person has
19 to fill out if they want to do non-medical research?

20 A. Yes, it is.

21 Q. At what level does the final approval come from?

22 A. Director Wall.

23 Q. Now, as to making public presentations as an
24 employee of the Rhode Island Department of Corrections,
25 is there a policy on that?

1 A. Yes, there is.

2 MR. DONNELLY: Your Honor, as to this exhibit, I
3 have extra copies for the Court.

4 Q. Let me show you Government's Exhibit 39.

5 MR. DONNELLY: Your Honor, I don't believe
6 there's an objection to it. I would move it full.

7 MR. MANN: No objection.

8 THE COURT: So this is --

9 MR. DONNELLY: 39.

10 THE COURT: -- 39. 39 will be full without
11 objection.

12 (Government Exhibit 39 admitted in full.)

13 Q. Is this the policy on public presentations that
14 was in effect from 2009 through 2012?

15 A. Yes, it is.

16 Q. It's my understanding that this policy was
17 recently revised, some minor revisions were made?

18 A. That is correct.

19 Q. But what is the general rule for a Department of
20 Corrections employee if they want to make a public
21 presentation? What is the rule? What do they have to
22 do?

23 A. The Department of Corrections has a public
24 presentation policy in place to ensure that the
25 presentations that are being done are consistent with

1 upholding the public image of the Department of
2 Corrections in the community, that the information
3 presented is accurate and that it reflects the
4 Department's mission appropriately.

5 MR. DONNELLY: Your Honor, if we can publish
6 this to the jury through the computer.

7 THE COURT: Sure.

8 Q. This is the first page of it, Ms. Imbriglio?

9 A. Yes, it is.

10 Q. Do you have to fill out a form for this as well to
11 get the permission?

12 A. Yes, we do.

13 MR. DONNELLY: Could we go to the second to the
14 last page, please.

15 Q. Is this a form if you want to do a one-time
16 presentation?

17 A. Yes, it is.

18 Q. There's a different form if you want to teach a
19 course; is that right?

20 A. That is correct.

21 Q. An academic course?

22 A. Correct.

23 Q. Now, you are in a supervisory role in the
24 Department of Adult Probation and Parole? You're
25 familiar with the records and how they're kept over

1 there?

2 A. Yes.

3 Q. And did you cause a search to be done of these
4 forms as to either research or presentation permission
5 that was sought by Mr. Silva during the years 2010 to
6 2012?

7 A. Yes, I did.

8 Q. Did you find any records that he had ever
9 submitted, a request for permission to do research or
10 make a presentation?

11 A. No, they did not.

12 Q. There were no records of that; is that correct?

13 A. Yes.

14 Q. Are computers issued to each and every probation
15 officer?

16 A. Yes, they are.

17 Q. Laptop computers?

18 A. Officers have desktop computers. We have laptops
19 that are assigned to the units or to the offices but
20 not to individual probation officers.

21 Q. Okay. Now, I've asked you whether there were any
22 records of this. You've known Mr. Silva for how long?

23 A. Almost ten years.

24 Q. Was there ever a time when you were his
25 supervisor, direct supervisor?

1 A. When he worked in the courthouse for -- back in I
2 think it was 2012, I was the courthouse supervisor so
3 when he came to cover court, he would be under my
4 supervision.

5 Q. When he was out in the field, he was under
6 somebody's else's supervision?

7 A. Correct.

8 Q. Who is that?

9 A. That would be Jean Embrey.

10 Q. If you were not his direct supervisor, were you
11 Jean Embrey's supervisor at this time?

12 A. I was the courthouse supervisor, so I handled the
13 courthouse operations for the officers coming in to
14 cover court, and she was handling the office in
15 Cranston.

16 Q. In the time frame directing you to 2010, 2012,
17 would you see Mr. Silva from time to time?

18 A. Yes, I did.

19 Q. And in what context would you see him?

20 A. Mr. Silva was assigned to the Cranston probation
21 unit, which was housed -- that houses the main
22 administration office. That's where we have our mail
23 and that's our main hub so I would constantly be going
24 in and out of the office to get my mail, to speak with
25 my administrators, et cetera.

1 Q. Would you from time to time have conversations
2 with Mr. Silva?

3 A. Yes.

4 Q. Did you ever work with him in the area -- did
5 Mr. Silva work with sex offenders?

6 A. Yes, he did.

7 Q. Did you as well?

8 A. As an officer or as a supervisor?

9 Q. Both.

10 A. Yes.

11 Q. Okay. So you're familiar with that aspect of
12 probation supervision?

13 A. Yes, I am.

14 Q. And during that time, directing you to 2010 to
15 2012, did Mr. Silva ever mention to you that he was
16 doing research into a topic related to the seduction of
17 minors by adults?

18 A. No.

19 Q. Did he ever mention to you he wanted to do a
20 presentation on that kind of thing?

21 A. No.

22 MR. DONNELLY: One moment, please, your Honor.

23 (Pause.)

24 That's all I have. Thank you.

25 THE COURT: Thank you, Mr. Donnelly.

1 MR. MANN: Could I have a moment?

2 THE COURT: Sure.

3 (Pause.)

4 MR. MANN: Could I ask Mr. Donnelly one
5 question?

6 THE COURT: Yes.

7 CROSS-EXAMINATION BY MR. MANN

8 Q. Good morning.

9 A. Good morning, Mr. Mann.

10 Q. Now, you were asked some questions about the roles
11 and functions of the probation and parole officer in
12 Rhode Island?

13 A. Yes, sir.

14 Q. And in fact, as the policy or the document that
15 was admitted as Exhibit 33 indicates, the title was
16 recently changed but for a long time the title was
17 "Probation and Parole Counselor," wasn't it?

18 A. Back in the '80's and probably '80's, '90's, yes.

19 Q. Then it was changed to "Probation and Parole
20 Officer," right?

21 A. Yes.

22 Q. But I think as you indicated, the role is sort of
23 a multifaceted role, part of the role is accountability
24 and part of the role is also to help rehabilitate the
25 offender?

1 A. Yes.

2 Q. And Rhode Island -- within that document, it
3 spells out many of the things that probation officers
4 are to do to help their caseload, the people on their
5 caseload, right?

6 A. Yes.

7 MR. MANN: And if I could have Exhibit 33,
8 briefly.

9 Q. If I just show you page one of 33, toward the
10 bottom it begins to identify some of the roles, some of
11 the things a probation officer is expected to do with
12 respect to rehabilitation, right?

13 A. Yes.

14 Q. And then if we went to the next page, there would
15 be a further elaboration of some of those factors,
16 right?

17 A. Yes.

18 Q. And Mr. Silva worked with a specific caseload,
19 right?

20 A. Yes.

21 Q. That was the sex offender caseload, right?

22 A. Yes.

23 Q. And that caseload was handled differently in the
24 Probation and Parole Office than the typical caseload,
25 right?

1 A. Yes.

2 Q. And one of the differences, for example, was
3 probation officers had a lower number of people that
4 they were supervising; is that correct?

5 A. Correct.

6 Q. And are you familiar with Mr. Silva's professional
7 background before he became a probation officer?

8 A. Very limited. Not really.

9 Q. Would you agree with me that particularly to be a
10 probation officer for sex offenders, it would be
11 helpful if you had a background in counseling and
12 clinical work?

13 A. Our probation officers are not assigned as
14 sex-offender-specific based on their background. It is
15 all done based on bidding, which is based on seniority.

16 Q. But would you agree with me, generally, that it
17 would be helpful for a probation officer, particularly
18 somebody dealing with sex offenders, to have a
19 background in dealing with clinical issues?

20 A. Yes.

21 Q. And if a person had a background in dealing with
22 people who had either been the victims of sexual abuse
23 or had been traumatized themselves or perhaps had been
24 offenders, that would also be helpful, wouldn't it?

25 A. Yes.

1 Q. Thank you.

2 Now, you talked about a policy with respect to
3 research; is that correct?

4 A. Yes.

5 Q. And I think that was Exhibit 38, if I'm not
6 mistaken.

7 If we look at the second page, second or third
8 page of this document, you're able to see that
9 document, right?

10 A. Yes.

11 Q. And it talks about behavioral medical research,
12 right?

13 A. Yes.

14 Q. And then it talks about non-medical research?

15 A. Yes.

16 Q. And when it talks about non-medical research, it
17 talks about the compilation, analysis and distribution
18 of statistical information, et cetera, affecting the
19 Rhode Island Department of Corrections, right?

20 A. Yes.

21 Q. So that's clearly talking about doing research
22 involving things like the population at the ACI, data
23 about the population and things like that, right?

24 A. Partially, yes.

25 Q. Now, if a person were an employee of the

1 Department of Corrections, is it your understanding of
2 this policy that if they were doing research that did
3 not involve the utilization of any Department of
4 Corrections data or inmate information that they would
5 still need permission to do research?

6 A. If the research is based on having to do with the
7 Department of Corrections, yes, you would need to have
8 permission.

9 Q. If it's based on what?

10 A. If it's based on information or anything having to
11 do with the Department of Corrections, yes, you would
12 need that permission.

13 Q. So if you were using information from the
14 Department of Corrections, even statistical
15 information, you would need permission to do that
16 research. Is that your position?

17 A. If it pertains to the Department or if it has to
18 do with the Department of Corrections, yes.

19 Q. So that, clearly, if somebody wanted to do
20 research on the demographic makeup of the population of
21 the ACI, they would need permission according to your
22 understanding of this policy, right?

23 A. Yes.

24 Q. And if they wanted to do -- you see this term
25 "behavioral research." Can you tell us briefly what

1 behavioral research is?

2 A. If they were looking at anything with the
3 population, with behavior changes, with, for example,
4 programming that's brought in to see if there's any
5 change in recidivism or in the behavior of individuals.

6 Q. So if you had an outside program teaching a course
7 at the ACI and then you wanted to see whether there was
8 a change of behavior following the utilization of that
9 course you would need permission because you were
10 utilizing data based on what happened at the Department
11 of Corrections, right?

12 A. Yes.

13 Q. Now, supposing somebody wanted to do research that
14 didn't involve data from the ACI. They wouldn't need
15 Department of Corrections' permission, would they?

16 A. If you're not doing it for the Department on your
17 own?

18 Q. Yes.

19 A. If it doesn't apply to the Department of
20 Corrections, then no.

21 Q. Then you don't need permission from anybody?

22 A. If it's not under the Department of Corrections or
23 you're not doing it on behalf of the Department of
24 Corrections.

25 Q. So assume you're not doing it on behalf of the

1 Department of Corrections, right, and you're not using
2 Department of Corrections data, then you don't need the
3 Department of Corrections' permission to do research.

4 Pretty clear, isn't it?

5 A. Yes.

6 Q. Now, Exhibit 39, I think, was the exhibit that
7 dealt with public presentations, right? Do you want me
8 to show it to you? I'm sorry.

9 A. Yes, please.

10 Q. This is the policy that deals with public
11 presentations, right?

12 A. Yes.

13 Q. And that requires somebody to obtain advanced
14 permission before they make a public presentation,
15 right?

16 A. Yes.

17 Q. And are there -- and there's a suggestion in this
18 policy, isn't there, that you do it with a certain
19 period of time in advance of when the employee would
20 want to make a presentation, right?

21 A. Right.

22 Q. And it doesn't specify an exact time. But can you
23 tell us how much time is generally requested -- or does
24 it specify an exact time?

25 A. I would have to go back to read the policy because

1 I don't recall exactly.

2 MR. MANN: May I approach the witness?

3 THE COURT: Yes.

4 Q. I'm showing you the last exhibit. Okay?

5 I'm happy to direct your attention to page three
6 where it seems to have a time frame for subsequent
7 approval, but is there any specific time frame for how
8 far in advance an employee should request permission?

9 A. Preferably at least ten working days prior to the
10 presentation. Under B2.

11 Q. Is your understanding that it's then basically the
12 preference is ten days in advance, right?

13 A. Yes.

14 Q. And just so we're clear, I'm asking you on that
15 paragraph that you were just reading from, it reads
16 something about -- well, let's put it up. I'll put up
17 my copy of it. Is it the employee is supposed to ask
18 ten days in advance or is that the time in which it's
19 supposed to be forwarded to the next level? This is
20 the paragraph you're talking about, number two, right?

21 A. Yes. That's correct.

22 Q. Let me ask you another question. Is it generally
23 your understanding that employees are supposed to give
24 ten days advanced notice before they want to make a
25 public presentation?

1 A. At least ten working days.

2 Q. At least ten working days. And do you know from
3 your experience how far in advance do employees
4 typically ask, two or three weeks, four weeks?

5 A. I would say so.

6 Q. And so you never -- not never, but people don't
7 usually ask months in advance for something, do they?

8 A. You could.

9 Q. But it's not the norm and not required?

10 A. Depending -- not normal, not required but
11 depending on how involved the project is.

12 Q. But the point is that you have to give some
13 advanced notice and typically people ask you said,
14 what, three, four weeks in advance?

15 A. Yes.

16 Q. Thank you.

17 MR. MANN: Could I have just a moment, please.

18 THE COURT: Yes.

19 (Pause.)

20 MR. MANN: I don't have anything further.

21 THE COURT: Thank you, Mr. Mann.

22 Mr. Donnelly, redirect?

23 **REDIRECT EXAMINATION BY MR. DONNELLY**

24 Q. Ms. Imbriglio, on cross-examination, I think
25 Mr. Mann's questions about whether you have to get

1 permission for research or not were framed in terms of
2 research concerning the ACI, correct?

3 A. Yes.

4 Q. The ACI is a part of the operations of the
5 Department of Corrections, correct?

6 A. Yes.

7 Q. Does this research policy apply outside of the
8 context of the ACI?

9 A. It applies to the entire Department of
10 Corrections, which is the institutional side as well as
11 rehabilitation services, yes.

12 Q. And if I heard you correctly on cross-examination,
13 did you testify that if somebody wants to do research
14 that's related to their employment with the Department
15 of Corrections, then the research policy applies?

16 A. Yes.

17 Q. And so if somebody wants to do research or do a
18 presentation that's based on their work with sex
19 offenders as a probation officer, would the policy
20 apply to that?

21 A. Yes.

22 MR. DONNELLY: Nothing further.

23 THE COURT: Thank you.

24 Mr. Mann?

25

RECROSS-EXAMINATION BY MR. MANN

2 Q. If I use the word "ACI" instead of the Department
3 of Corrections, if I reworded my question and made it
4 the Department of Corrections, would that change any of
5 your answers?

6 Mr. Donnelly pointed out that I apparently went
7 back and forth between the terms "Department of
8 Corrections" and "ACI." You and I know "ACI" stands
9 for Adult Correctional Institutions, right?

10 A. Yes.

11 Q. And that's part of the Department of Corrections?

12 A. Yes.

13 Q. And the Department of Corrections also includes
14 probation and parole, right?

15 A. Correct.

1 supervising sex offenders? If a person were a
2 probation officer and they were doing research that
3 used data from the population they were servicing,
4 information about that, then the policy would clearly
5 apply, right?

6 A. Yes.

7 Q. Now, if the person were doing research that didn't
8 employ or use the data from the population they were
9 servicing and it made -- didn't use any information
10 that would in any way connect or identify any of the
11 people at the ACI or Department of Corrections,
12 parolees, probationers, the policy wouldn't apply,
13 would it?

14 A. You just lost me with the --

15 Q. Okay. Let me back up.

16 If a probation officer were supervising sex
17 offenders, clearly if they used information about the
18 sex offenders they were supervising in their research,
19 the research policy would apply, correct?

20 A. Yes.

21 Q. If they were doing research that didn't in any way
22 identify, connect to their population but instead were
23 doing theoretical research about sex offenders, the
24 policy wouldn't apply, would it?

25 A. If it involved work for the Department or research

1 involving the Department, yes. If it doesn't, no.

2 Q. So it just depends on whether it involves work
3 related to the Department, working for the Department
4 or if it's work that's not for the Department, right?

5 A. Yes.

6 Q. And if it's not work for the Department, then the
7 policy doesn't apply?

8 A. No.

9 Q. No, meaning you agree that the policy doesn't
10 apply?

11 A. Yes.

12 MR. MANN: Thank you. Nothing further.

13 MR. DONNELLY: Nothing further, your Honor.

14 THE COURT: Okay. Thank you very much.

15 Ms. Imbriglio, your testimony is complete. You may
16 step down. Thank you.

17 THE WITNESS: Thank you, your Honor.

18 MR. DONNELLY: The United States calls Kenneth
19 Bell, your Honor.

20 **KENNETH BELL, GOVERNMENT WITNESS, SWORN**

21 THE CLERK: Please state your name and spell
22 your last name for the record.

23 THE WITNESS: My name is Ken Bell, B-E-L-L.

24 THE COURT: Good morning, Mr. Bell.

25 THE WITNESS: Good morning.

1 THE COURT: And you may inquire, Mr. Donnelly.

2 MR. DONNELLY: Thank you, your Honor.

3 **DIRECT EXAMINATION BY MR. DONNELLY**

4 Q. Mr. Bell, could you tell the jury how you're
5 presently employed?

6 A. I'm currently employed at Raytheon Company, and
7 I'm a senior intelligence analyst with the Enterprise
8 Risk Group there.

9 Q. And as a senior what?

10 A. Intelligence analyst.

11 Q. Do you have a role in the cyber security of the
12 systems at Raytheon computer systems?

13 A. Yes, I do.

14 Q. How long have you been with Raytheon?

15 A. Just over a year-and-a-half now.

16 Q. What were you doing prior to that?

17 A. I was working with the Rhode Island State Police.

18 Q. And how long were you a state trooper?

19 A. Just over 20 years.

20 Q. And for the -- directing you to the latter part of
21 your career with the state police -- well, you retired
22 after 20 years; is that correct?

23 A. That's correct.

24 Q. When you retired, what was your rank, title,
25 duties?

1 A. I was a detective sergeant. I was actually in
2 charge of the Computer Crimes Unit, which comprised two
3 different units, one being the Internet Crimes Against
4 Children Task Force, and also we had a Cyber Security
5 Task Force so I supervised both those units.

6 Q. And would it be fair to say that over to the
7 years -- when did you begin receiving training in the
8 computer side of law enforcement work, approximately?

9 A. Well over ten years ago, I would say.

10 Q. Do you know the Defendant on trial, Gerald Silva?

11 A. Yes, I do.

12 Q. And how long have you known Mr. Silva?

13 A. Several years.

14 Q. Okay. Did you come to know him while you were
15 working with the Computer Crimes Unit of the state
16 police?

17 A. Yes, I did.

18 Q. In what capacity?

19 A. Jerry was a probation officer who had a sex
20 offender caseload. And as part of what we started to
21 do to kind of do some proactive work with that unit was
22 we'd actually go out with Jerry and other members of
23 probation and parole and actually do home checks on the
24 sex offenders to make sure that they were actually
25 doing what they were supposed to do; and more

1 specifically related to Internet and computers, we'd
2 actually go to their houses and actually conduct
3 computer checks to see the type of activity they were
4 doing online.

5 Q. And the computer checks, were those often done
6 pursuant to the court placing a condition of probation
7 on that particular person?

8 A. Yes, that's correct.

9 Q. And that one of those conditions was you have to
10 allow law enforcement to look at your computer every
11 now and then?

12 A. That's correct.

13 Q. And why was it that you went along or a state
14 trooper from the Computer Crimes Unit would go along
15 with the probation officer?

16 A. In order to do those checks, it takes a
17 specialized skill. So even though you might think you
18 just turn on someone's computer, we actually had to use
19 specialized software, specialized hardware in order to
20 do that. So it took a certain level of skill.

21 The other thing is from a safety standpoint you
22 wanted a law enforcement officer there for safety
23 reasons. You're in someone else's home. And the other
24 part of that was from the direction of the Department
25 of Corrections, the probation officers didn't have

1 authorization to actually conduct those type of checks
2 at defendants' residences.

3 Q. What do you mean "those kinds of checks"?

4 A. Computer checks to actually do the onsite forensic
5 preview of the computer.

6 Q. What was your understanding as to whether
7 probation officers could look for child pornography on
8 somebody else's computer and what they had to do if
9 they found it?

10 A. So I knew that probation officers were not allowed
11 to do that and that was the reason why we had to go out
12 as the state police.

13 Q. Probably after you retired, did Inspector Connelly
14 of the Postal Inspection Service contact you about this
15 case?

16 A. Yes, he did.

17 Q. And did he make a request of you?

18 A. Yes, he did.

19 Q. What was that request?

20 A. He requested that if I could come back to the
21 state police and actually look at my e-mail account and
22 see if there were any e-mails from the Defendant to
23 myself.

24 Q. Were you particularly asked to see if there were
25 any e-mails relating to the Defendant e-mailing you

1 about a company called Azov Films?

2 A. That's correct.

3 Q. Did you do that?

4 A. Yes, I did.

5 Q. Did you turn over all the e-mails that you found
6 to Inspector Connolly?

7 A. Yes, I did.

8 Q. And prior to coming into court here today, did you
9 have an opportunity to review those e-mails?

10 A. Yes, I did.

11 Q. And showing you Government's Exhibit 29, 30 and
12 31, were these the exhibits you were shown before
13 coming into court this morning?

14 A. That is correct.

15 MR. DONNELLY: Your Honor, I would move Exhibits
16 29, 30 and 31 full.

17 MR. MANN: No objection, your Honor.

18 THE COURT: All right. 29, 30 and 31 will be
19 full.

20 (Government Exhibits 29, 30 and 31 admitted in
21 full.)

22 MR. DONNELLY: And if we could switch over to
23 the computer, please, and bring up Government's Exhibit
24 29.

25 Q. Is this the first e-mail you found that related --

1 that was from Mr. Silva and related to what he
2 eventually identified to you as Azov Films?

3 A. That's correct.

4 Q. And referring to this particular e-mail, did he
5 start the discussion by saying, "I have some info that
6 I think might be of interest to you"?

7 A. That's correct.

8 MR. DONNELLY: Could we go to Government's
9 Exhibit 30, please.

10 Q. Mr. Bell, this is a printout of an e-mail thread.
11 Is it fair to say that if we want to read these
12 chronologically, we should start with the second to the
13 last page and work our way forward?

14 A. That's correct.

15 MR. DONNELLY: Could we go the page two, please.

16 Q. The original e-mail that was sent, what was the
17 date that you received the original one that I just
18 reviewed with you?

19 A. Well, the time that it was sent was May 11, 2011,
20 at approximately 11:17 a.m.

21 Q. May 11th of 2011. And then did you write back to
22 Mr. Silva?

23 A. That's correct.

24 Q. And I believe the header on this is on page one
25 but this is the content of what you wrote to him; is

1 that right?

2 A. That's correct.

3 Q. Simply that Mr. Silva had the right e-mail address
4 for you?

5 A. That's correct.

6 MR. DONNELLY: Could we go to page one now,
7 please.

8 Q. It was from you to Mr. Silva, correct?

9 A. That's correct.

10 Q. Now, as to the top part of the e-mail --

11 MR. DONNELLY: Could we blow up the header up
12 there, please.

13 Q. And when was this e-mail sent by Mr. Silva?

14 A. That was May 12th, 2011, approximately 12:02 p.m.

15 Q. Directing your attention to the second paragraph
16 there that begins: "FYI, I discovered a website called
17 Azov," do you recall this e-mail?

18 A. So at the time I did not. But after reading it,
19 it kind of -- it's very -- after reading it, when I was
20 first asked about this e-mail by Inspector Connelly, I
21 didn't recall it.

22 MR. MANN: Objection.

23 THE COURT: I'll sustain the objection. Just
24 focus on the question that he asked and just try to
25 answer only the question that's been asked; and if you

1 need it reread, I can do that for you.

2 THE WITNESS: Thank you, your Honor.

3 THE COURT: Would you like it reread?

4 THE WITNESS: No, your Honor.

5 MR. DONNELLY: I'll start a new question.

6 Q. When you were first asked by Inspector Connolly,
7 did you recall getting these e-mails?

8 A. No, I do not.

9 Q. All right. And once you searched for them and
10 found them, did that refresh your recollection?

11 A. Yes, they did.

12 Q. And was -- did you communicate with Mr. Silva a
13 lot by e-mail?

14 A. No, I did not.

15 Q. Did Mr. Silva ever tell you about his use of
16 computers?

17 A. We had a conversation about his use of computers,
18 correct.

19 Q. What did he say to you?

20 A. He said that he didn't own a computer, and he was
21 very -- he didn't know much about computers, and I
22 think at one point he may have purchased a computer
23 which was from the specs that his partner had also
24 received one, Heidi. So that was my first knowledge of
25 him possibly owning a computer.

1 Q. Do you recall this e-mail that begins, "FYI, I
2 discovered a website called Azov. They claim to be a
3 European naturist website. However, the only naturist
4 films that they have are of nude boys. They sell
5 mainstream films as well. I suspect they do this to
6 provide an air of legitimacy. They provide brief
7 previews of the movies that they sell. None of them
8 appear to 'cross the line' into pornography though I
9 think they definitely flirt with the line."

10 Do you recall him writing that to you?

11 A. Yes, I do.

12 MR. DONNELLY: If we could go on to the next
13 paragraph.

14 Q. "It appears that it is administered by Russians.
15 I believe that they will cross the line at some point
16 if they haven't already. They have 'special offers' on
17 for 'special customers.' I don't know what they are
18 and I do not intend to find out. They have a link that
19 they recently installed on the bottom left of the home
20 page that had a purple heart called 'Boy Joy.' The
21 link goes to Triple X young adult male sex films. Once
22 again, I haven't explored this site in depth; however,
23 one of the 'teaser' pages gives the name of a male
24 'actor' with the phrase 'all grown up.'" And it goes
25 on.

1 In fact the next paragraph says, "I suspect (no
2 proof of evidence) that the boys featured in their
3 'naturist' films are being groomed to perform in the
4 pornographic adult films when they come of age."

5 Did you ever write back to Mr. Silva? Did you
6 check to see whether you had any items in your "Sent"
7 items where you responded back to him?

8 A. Yes, I did.

9 Q. Did you ever write back to him about this e-mail?

10 A. No, I did not.

11 Q. Now, he says that he suspects the website was
12 being administered by Russians. Is this the kind of
13 investigation that you would -- what did you do after
14 receiving this e-mail?

15 MR. MANN: Objection.

16 THE COURT: Well, the last question is not
17 inappropriate so overruled.

18 A. I did nothing.

19 Q. Can you -- why didn't you act on this?

20 MR. MANN: I object now.

21 THE COURT: Come up.

22 (Sidebar conference.)

23 THE COURT: What's the objection?

24 MR. MANN: What his state of mind is and what
25 this then detective did or did not do has nothing to do

1 with whether Silva is guilty or not. He can't -- I
2 mean, I don't know what he's going to say for sure, but
3 if he's going to make comments about Silva, those are
4 just opinion comments.

5 MR. DONNELLY: No, he's not.

6 THE COURT: I think I get your point.

7 MR. DONNELLY: It's just going to be actually
8 fairly simply. He's just going to say we're incredibly
9 busy; we were just so backed up investigating Rhode
10 Islanders I just didn't have time to look into an
11 international --

12 MR. MANN: I have no objection to that.

13 THE COURT: Okay. Thank you.

14 (End of sidebar conference.)

15 MR. MANN: I withdraw the objection.

16 THE COURT: Thank you.

17 Q. I think the question pending was you said you
18 didn't follow-up on this particular e-mail; is that
19 right?

20 A. That's correct.

21 Q. And were you doing other things? How come you
22 didn't follow-up on it?

23 A. There's no actionable information contained in
24 that e-mail that I could actually investigate.

25 Q. Were you -- could you just describe for the jury,

1 you had other duties at the time, correct?

2 A. Absolutely.

3 Q. You were supervising both sides of the Cyber Unit,
4 the Internet Crimes Against Children Task Force as well
5 as the cyber security aspect of it?

6 A. That's correct.

7 Q. And how many cases was the Cyber Crime Unit
8 working on at any given time?

9 A. We had hundreds of cases, more cases than we could
10 actually investigate that year. We probably arrested
11 close to 60 people, which is at least, you know, more
12 than one person per week. And we're also responsible
13 for the computer forensics not only for those cases but
14 for every single police department and most federal law
15 enforcement agencies in the state. So we're a very
16 busy unit.

17 Q. If a computer is seized by the South Kingstown
18 Police Department, they would bring it to you; is that
19 right?

20 A. That's correct.

21 Q. And they don't have their own computer forensic
22 people, correct?

23 A. That's correct.

24 Q. By and large. So you had other real cases
25 involving Rhode Island targets at that time, correct?

1 A. More than we could handle.

2 MR. DONNELLY: Could we go to the final e-mail.
3 Government's 31.

4 Q. Mr. Bell, referring you to this e-mail, when was
5 this e-mail sent to you?

6 A. This was sent looks like June 3rd, 2011,
7 approximately 3:56 p.m.

8 Q. A few weeks after the May 12th one we were just
9 looking at?

10 A. That's correct.

11 Q. And referring you to the second paragraph here,
12 regarding the website issue, "I cruised by Starbucks
13 yesterday and borrowed their wi-fi. I don't know if
14 you had anything to do with it, take the credit
15 anyways, but it appears to have disappeared off the
16 face of the planet. I just hope that the Russians are
17 not scurrying back to their home turf to reestablish
18 themselves. I hope that the authorities are all over
19 them."

20 Did you know what he was talking about in this
21 e-mail?

22 A. No, I did not.

23 Q. Did you know he was referring to the Azov Films
24 website?

25 A. Not at that point.

1 Q. You know that now?

2 A. Yes, I do.

3 Q. Did you know that the website had been taken off
4 by other law enforcement authorities in Canada?

5 A. No, I did not.

6 Q. In your interactions with Mr. Silva, did he ever
7 tell you that he was doing a research project on the
8 topic of the seduction of minors by adults?

9 A. Never.

10 Q. And did he ever tell you to your face or on a
11 telephone call outside of these e-mails that he had
12 found a website, Azov Films, that contained pictures of
13 nude boys?

14 A. Never.

15 Q. Or that he was doing research for a presentation
16 at work about the seduction of minors?

17 A. Never.

18 MR. DONNELLY: One moment please, your Honor.

19 (Pause.)

20 MR. DONNELLY: Bring up page one of Exhibit 30,
21 I believe.

22 Q. You were mentioning about your conversation with
23 Mr. Silva about his use of computers. Do you see the
24 first paragraph that we have on this particular screen,
25 "I do not have the Internet, nor do I intend to

1 purchase it."

2 Did Mr. Silva tell you at any time in any form
3 that he had made over \$1500 in purchases from this Azov
4 Films website?

5 MR. MANN: Objection. I withdraw.

6 THE COURT: All right. You may answer.

7 A. No, he did not.

8 MR. DONNELLY: Thank you, your Honor. No
9 further questions.

10 THE COURT: Thank you, Mr. Donnelly.

11 Mr. Mann.

12 **CROSS-EXAMINATION BY MR. MANN**

13 Q. Good morning, sir.

14 A. Good morning.

15 MR. MANN: Could I have the three exhibits,
16 please. I'm sorry. Could this be published to the
17 jury?

18 Q. This is the first e-mail that initiates all this
19 stuff, right?

20 A. That's correct.

21 Q. And you look at the second paragraph here, it says
22 also, "Heidi and I signed up for your seminar on May
23 25th. We look forward to seeing you then." Is that
24 correct, sir?

25 A. That's correct.

1 Q. I assume you were scheduled to teach a seminar on
2 May 25th?

3 A. That's correct.

4 Q. Do you remember what it was about?

5 A. It was a seminar that I was teaching on behalf of
6 the Department of -- it wasn't Department. It was Day
7 One. So it was Day One had sponsored a day seminar and
8 I was actually instructing on that day.

9 Q. Do you remember generally what you were going to
10 be instructing about?

11 A. I don't recall the particulars, but from what I
12 recall it was something to -- it was instruction to
13 police officers, also probation officers, and also
14 people in the healthcare profession. And basically, it
15 was about our work with sex offenders.

16 Q. Now, if I show you the next e-mail, it starts --
17 at the bottom of the e-mail where you send an e-mail
18 back to Mr. Silva, it appears to be about 8:29 on May
19 12th, right?

20 A. That's correct.

21 Q. And this is the actual e-mail, isn't it?

22 A. That's correct.

23 Q. And to back up for a second, in the first e-mail
24 he said to you words to the effect he wanted to make
25 sure he had the right e-mail address before he sent you

1 everything.

2 A. That's correct.

3 Q. And this is your response right there, isn't it?

4 A. That's correct.

5 Q. The second sentence is, "This is my correct e-mail
6 address," right?

7 A. That's correct.

8 Q. You're just confirming that he has your correct
9 address.

10 A. Sure.

11 Q. And the first sentence of that response is "You
12 and Heidi can probably teach the class," correct?

13 A. Absolutely.

14 Q. First, do you remember, who is Heidi? Is that
15 Heidi Dupre?

16 A. Yes.

17 Q. And do you remember, was she also a probation
18 officer?

19 A. Yes, she was.

20 Q. Did you know that she worked sometimes with
21 Mr. Silva?

22 A. Yes, very often.

23 Q. And you say, "You and Heidi can probably teach the
24 class." What did you mean by that?

25 A. Well, Heidi and Jerry, we worked very closely.

1 They had a sex offender caseload, and I had done
2 several checks with them on their sex offender caseload
3 as it relates to going out and doing checks and
4 actually computer checks at the residences of sex
5 offenders. And basically my presentation was going to
6 be on sex offenders so most of the stuff that was
7 related to there was actually activity that Jerry had
8 been along with me and also Heidi had been along with
9 me, and we had made several arrests during those checks
10 related to child pornography on sex offenders'
11 computers.

12 Q. Now, if I show you the third e-mail, this is the
13 third e-mail dated June 3rd, right?

14 A. Sure.

15 Q. And in that e-mail Mr. Silva says that it appears
16 to have disappeared off the face of the planet, right?

17 A. That's correct.

18 Q. Did I understand that when you -- in response to
19 one of Mr. Donnelly's questions, you said that at that
20 point you did not know that Azov had been shut down?

21 A. No, I did not.

22 Q. Thank you.

23 Now, you mentioned something about at one point
24 Mr. Silva didn't have a computer and you were aware
25 that he was getting a computer; is that right?

1 A. There was some talk, I remember, like I said we
2 spent a lot of time together, me, the Defendant and
3 also Heidi Dupre, conducting sex offenders checks. So
4 we spent a lot of time together.

5 Q. And did you give him advice or help him in any way
6 with sort of getting the right computer or getting the
7 right software on it or something?

8 A. So at one point I remember that in the office that
9 I and another detective had just ordered new laptops,
10 and I think we had given the specs to Heidi and I think
11 Heidi may have passed those specs to Jerry. I'm not
12 sure if he actually did purchase that same identical
13 computer that I know myself, another detective and also
14 Heidi had purchased at one time.

15 Q. Are you able to place a date on that at all, sir?

16 A. No, I'm not.

17 MR. MANN: Fair enough.

18 Could I have just one moment, please.

19 THE COURT: Sure.

20 (Pause.)

21 MR. MANN: I have nothing further of Mr. Bell,
22 Sergeant Bell.

23 THE COURT: Thank you, Mr. Mann.

24 Mr. Donnelly, do you have any redirect?

25 MR. DONNELLY: Just one area.

1 Q. Have you ever seen him or heard of him teaching at
2 all?

3 A. Never.

4 MR. DONNELLY: Nothing further.

5 THE COURT: Recross, Mr. Mann?

6 MR. MANN: Nothing, your Honor.

7 THE COURT: Okay. Thank you.

8 All right. Mr. Bell, your testimony is
9 complete. You may step down. Thank you very much.

10 THE WITNESS: Thank you.

11 MR. DONNELLY: While he exits, may I have one
12 moment with Ms. Anderson?

13 THE COURT: Yes.

14 (Pause.)

15 MR. DONNELLY: Thank you, your Honor.

16 Your Honor, at this time the United States rests
17 its case against the Defendant.

18 THE COURT: Thank you, Mr. Donnelly.

19 All right. Ladies and gentlemen, we're going to
20 take our morning break now. The break will be a little
21 bit longer than usual because there are a couple of
22 legal issues I have to take up with counsel at this
23 time. We've arranged for the morning snacks to be
24 delivered a little bit earlier so they're there in the
25 jury room waiting for you.

1 I want to remind you of all my instructions not
2 to have any conversations about the case until you're
3 prepared to deliberate the case after all the evidence
4 is closed.

5 Charlie will show you to the jury room. Thank
6 you very much.

7 (Proceedings out of the presence of the jury as
8 follows:)

9 THE COURT: Mr. Mann, you have a motion.

10 MR. MANN: Yes, your Honor. I have a motion
11 under Rule 29 of the Rules of Criminal Procedure for
12 judgment of acquittal.

13 I'll address first, Judge, Counts I through VI,
14 which are the six receipt counts.

15 For the Government to prove receipt of child
16 pornography in Counts I through VI, your Honor, many of
17 the legal issues in this case have already been
18 identified, but I want to focus on a few of them that
19 are specifically relevant to the judgment of acquittal.

20 The Government has to show, first of all, that
21 the images that are the basis for Counts I through VI
22 constitute child pornography; and as the Court has
23 already explained to the jury, in this case that comes
24 down to a determination of whether or not the images
25 constitute the lascivious exhibition of the genitals of

1 any person and that's based on -- and that is a
2 statutory term and the First Circuit has said that it
3 is informed but not determined by the Dost factors,
4 Judge.

5 So my first argument is that all you have seen
6 so far is nudity and that mere nudity is not enough to
7 constitute the lascivious exhibition of the genitals;
8 and that with respect to those counts, Judge, since all
9 that you have seen is mere nudity and that is all that
10 is in the record, that is insufficient to establish the
11 lascivious exhibition of the genitals.

12 If one looks at the so-called Dost factors,
13 which are informative but not determinative, the first
14 factor is whether the genitals are the focal point of
15 the image. And I would submit to you that they are
16 not. Certainly the genitals are visible. You can
17 certainly see them, but they're not the focal point,
18 Judge. In fact, every single picture appears to
19 include -- it's either a full picture of the person or
20 their face. In the case you may not see their face if
21 it's a picture of their back, but there's no effort to
22 conceal the identity of the person. And more to the
23 point generally speaking what you see is an entire
24 person or, if they're wrestling, their whole body in
25 the wrestling mask, the front and back, but you

1 basically see the whole person, Judge.

2 The second factor is whether or not the setting
3 of the image is sexually suggestive, and I would
4 suggest to you that none of the settings that you saw
5 were sexually suggestive. They all had multiple
6 people. They're all young boys, young meaning
7 generally in the neighborhood of 6 to 16 or 17, Judge.
8 But there was nothing sexually suggestive in any of
9 those settings. There were some on the bed, for
10 example, but the bed was more used as a place for
11 jumping up and down and rough-housing or giving a
12 massage than it was for anything sexual.

13 The third factor is whether the child was
14 depicted in an unnatural or inappropriate act in
15 unnatural pose or inappropriate attire. There wasn't
16 any real posing in these cases. It's all boys acting
17 out, Judge, and doing things that boys would do. And
18 frankly, all these photographs if the boys had had
19 clothes on them, nobody would think a thing of them.
20 With respect to the pictures of the video with the boy
21 sitting on the basketball with the chicken, it was
22 crude and not very much fun to look at but it certainly
23 wasn't sexually suggestive. I can't imagine that
24 invoking any sort of sexual response, Judge, and it
25 certainly wasn't the kind of attire or pose that would

1 be sexual.

2 Fourth factor is whether the child is partially
3 clothed or nude. Generally speaking the boys were nude
4 or if they were clothed they were in bathing suits, for
5 example, if they were swimming. It's not inappropriate
6 attire going back to number three, too.

7 The fifth factor is whether the image suggests
8 sexual coyness or a willingness to engage in sexual
9 activity. There's nothing in any of these exhibits
10 that suggest sexual coyness. You don't have -- to my
11 recollection, you don't see a single item that would
12 suggest sexuality. In fact, if you compared what we
13 saw with the verbal description given by Officer
14 Connelly about kids in Speedo, boys in Speedo bathing
15 suits, that's what might be sexually suggestive, a
16 person in a bathing suit with a bulge in their groin
17 area. You saw nudity, but again, you didn't see
18 anything, I would suggest, sexually suggestive. You
19 didn't see a single erection. You didn't see the use
20 of sex toys. There was nothing except that they were
21 nude, Judge. And there's nothing to suggest a
22 willingness to engage in sexual activity.

23 The sixth factor is that the image is intended
24 to elicit a sexual response in the viewer. There
25 again, I would suggest there's nothing to suggest that

1 these images were intended to elicit a sexual response.
2 I can't imagine a boy sitting on a basketball was
3 intended to elicit a sexual response. It's nudity, but
4 there's nothing there that suggest there's an intent to
5 elicit a sexual response.

6 Now, I think the Court of Appeals has said you
7 can consider these factors, they're not determinative,
8 you can consider other factors, too. Certainly one of
9 the other the factors that you could consider in this
10 case I would suggest at this stage is there's not a bit
11 of evidence in this case that Mr. Silva ever responded
12 to these images in a sexual way, ever used these images
13 sexually, ever used these images for any sexual
14 stimulation or anything like that at all.

15 I think when you add up all that, the Government
16 fails, even in the light most favorable to the
17 Government, of being able to prove that these images
18 constitute a lascivious exhibit of the genitals.
19 That's part one of the motion with respect to the first
20 six counts.

21 There's a second part of the argument with
22 respect to Counts I through VI. The Government has to
23 prove that Mr. Silva knew the videotape or the images
24 contained an image of child pornography, and then you
25 go back to the definition of what child pornography is,

1 which is a lascivious exhibition of the genitals.

2 And I would say to the Court that there's no way
3 the Government can prove or has proved that when
4 Mr. Silva received these materials that he knew at that
5 point that they contained an image of child
6 pornography, Judge.

7 When he received these images, first we know
8 that when he received these images, they were in
9 packages basically -- not basically. They were in
10 mailing packages. Even if you get beyond the mailing
11 package and you get to the actual DVDs, the DVD is in a
12 DVD case. There's no way he can know at that point
13 whether or not the images therein are lascivious or
14 not. He can't possibly know until he looks at the
15 images, if he can even know then. But certainly at the
16 time when he receives them, he can't know that these
17 images are lascivious. And I harken back to the
18 comment on Mr. Connelly yesterday when I asked him
19 about two other videos, "Mountain Men" and "Pool
20 Buddies," and he said he would have had to view them
21 more than just a little bit, I'm paraphrasing, in order
22 to determine whether or not they constituted child
23 pornography or child erotica.

24 Mr. Silva gets these DVDs. There's no dispute
25 that he receives them. How can he know, which is part

1 of the Government's proof, how can he know at that
2 point that the DVDs have lascivious exhibition of the
3 genitals. You just can't know.

4 Now, the second part of that argument is that
5 even after he views them, I would argue he can't know,
6 A, because I would argue, A, because they're not
7 lascivious, that's the argument I just made; and B,
8 because the definition of "lascivious" is so vague. I
9 would just reference back to the argument I made on the
10 motion to dismiss for vagueness, Judge.

11 So for all of those reasons, I would move for
12 judgment of acquittal on Counts I through VI.

13 Now, with respect to Count VII, Judge, the
14 argument about whether the photos are lascivious is the
15 exact same argument as it is with respect to Counts I
16 through VI and I just incorporate it by reference,
17 whether they're lascivious, the same definition for
18 possession and receipt. The difference is only whether
19 or not with respect to Count VII that Mr. Silva knew
20 when he possessed them that they were lascivious,
21 Judge. And there the problem the Government faces is,
22 again, proving that he actually knew that they were
23 lascivious, Judge.

24 Now, I suspect the Government will argue that he
25 had those in his possession, Judge, but they certainly

1 haven't proven that he viewed those parts of the DVDs
2 which they claim are lascivious. All they have proven
3 is that he had them in his possession.

4 I would also say with respect to Counts I
5 through VI, they haven't proven that he viewed those
6 parts of any of those DVDs. Obviously they think some
7 of that is lascivious. They haven't proved that he
8 viewed those. They proved that he received them. So
9 for all of those reasons, I would press the motion for
10 judgment of acquittal of all the counts, Judge.

11 THE COURT: Is it your position that the
12 Government is required to prove that he reviewed or
13 viewed the material in order to prove possession?

14 MR. MANN: No. That he had to know that they
15 were lascivious. In other words, my understanding of
16 the count of possession is that the Government has to
17 prove that he knew the images -- the Government is
18 going to argue, I anticipate, that you could infer that
19 he knew because they were in his possession. And my
20 argument there, Judge, is that they have to prove that
21 he knowingly possessed the material, that he knew it
22 contained a visual depiction of a person engaging in
23 sexual conduct. All they've shown is that he had
24 those. They haven't shown that he actually knew that
25 they included child pornography. I acknowledge that

1 the argument is stronger with respect to Counts I
2 through VI. With respect to Counts I through VI, I
3 don't see how the Government gets to proving that when
4 he received them he knew they had child pornography.

5 With respect to Count VII, I at least understand
6 the Government's argument or what I anticipate the
7 argument to be.

8 THE COURT: All right. Let's hear from
9 Mr. Donnelly.

10 MR. DONNELLY: Your Honor, the United States
11 starts as far as the lascivious argument, which is the
12 same as to Counts I through VI as well as Count VII,
13 the Government relies on United States versus Frabizio,
14 particularly its statement that "lascivious" is a
15 commonsensical term and whether a given depiction is
16 lascivious is a question of fact for the jury. I don't
17 know how much argument the Court wants on the
18 lascivious --

19 THE COURT: I think I've already ruled on that
20 in the pretrial motions so I don't think you need to
21 argue that one.

22 MR. DONNELLY: Okay. As to the knowledge issue,
23 your Honor, the Government has to show that the
24 Defendant knowingly received these videos. I think
25 we've presented more than enough evidence, probably

1 overwhelming evidence that the Defendant knew exactly
2 what he was receiving.

3 The Court will note that -- I can't remember
4 what page it was from Government's Exhibit 21, that's
5 the invoices exhibits, that the first charged Azov
6 Films receipt is that of "FKK Waterlogged," which is
7 charged and specified in Count I. There were several
8 orders that took place before that. You know, if the
9 Defendant ordered one DVD and that was it, I doubt we'd
10 be here today for a number of reasons, among them
11 including we might not be able to show he didn't know
12 what he was ordering or what he was getting. But you
13 take the fact that he had previously ordered several
14 videos in several orders, combine it with the fact that
15 the Azov website provided previews of what's coming in
16 the form of I believe Inspector Connally or Inspector
17 Bone testified that there are preview photographs, but
18 more than that we have as a full exhibit Government's
19 Exhibit 28, which is the catalog of all of the charged
20 videos, the catalog entries.

21 So somebody on the website certainly has more
22 than a small idea of what they're going to get in these
23 videos. After you get the first one, there might be an
24 innocent explanation for the first one but once you
25 start getting all the others and you start taking

1 affirmative actions, when you pay extra money for still
2 images, that goes to the Defendant's state of mind, why
3 do we want still images, most of which are cropped
4 photographs of boys sitting with their legs spread
5 exposing their genitals. I think we go well beyond the
6 minimum knowledge that is required under the statute
7 particularly at this stage of the proceedings.

8 THE COURT: Thank you, Mr. Donnelly.

9 MR. MANN: Can I just respond very briefly?

10 THE COURT: Very briefly.

11 MR. MANN: I don't think the Government's proved
12 that he saw the catalog. We agree those are the
13 catalogs. I don't think the Government proved that he
14 saw those.

15 THE COURT: That may be true but the Government
16 did put on evidence of the invoices that Mr. Donnelly
17 described, I believe.

18 So I'm going to deny the Rule 29 motion for
19 judgment as a matter of law. I believe the Government
20 has more than met its burden taking the evidence in the
21 light most favorable to the Government at this stage of
22 the proceedings, both to meet the statutory element of
23 lascivious exhibition. As noted by Mr. Donnelly, the
24 Frabizio case clearly indicates that that is a term
25 that is a common sense term that is within the ken of

1 the jury to determine and the Dost factors may be
2 considered but are not determinative. There's more
3 than enough evidence here from which the jury could
4 conclude that the films meet the statutory definition
5 of lascivious exhibition.

6 With respect to the issue of whether the
7 Government has proven the element of knowing receipt or
8 knowing possession, I believe Mr. Donnelly has
9 correctly outlined the circumstantial evidence from
10 which the jury could infer that he, the Defendant, knew
11 that the materials that he was ordering and receiving
12 and possessing were indeed child pornography.

13 So for all of those reasons, I'm going to deny
14 the Defendant's Rule 29 motion.

15 We'll take a break for ten minutes and when we
16 return, Mr. Mann, I take it you'll be calling the
17 Defendant as your first witness.

18 MR. MANN: Calling the Defendant. We're going
19 to start to play the videos, and I've already put on
20 the record my understanding about being able to confer
21 with my client.

22 THE COURT: Yes. Okay. Very well. We'll see
23 you in ten minutes.

24 (Recess.)

25 (Proceedings in the presence of the jury as

1 follows:)

2 THE COURT: Welcome back, ladies and gentlemen.
3 So as you heard before we broke, the Government has
4 rested its case. So now is the opportunity for the
5 Defendant to present evidence if he wishes to do so.
6 You remember I explained to you at the beginning of the
7 trial the Defendant has no obligation to do that. My
8 understanding is Mr. Mann does have witnesses he wishes
9 to call. So I'm going to turn it over to Mr. Mann.

10 Are you ready to call your witness?

11 MR. MANN: I am, your Honor. Thank you. The
12 defense calls Mr. Silva.

13 **GERALD SILVA, DEFENDANT'S WITNESS, SWORN**

14 THE CLERK: Please state your name and spell
15 your last name for the record.

16 THE WITNESS: Gerald Silva, S-I-L-V-A.

17 THE COURT: Good morning, Mr. Silva.

18 THE WITNESS: Good morning.

19 THE COURT: You may inquire, Mr. Mann.

20 **DIRECT EXAMINATION BY MR. MANN**

21 Q. Good morning, Mr. Silva.

22 A. Good morning.

23 Q. Mr. Silva, I'm showing you Government's Exhibit 1.

24 Do you see that, sir?

25 A. Yes, sir.

1 format; however, now since the Defendant wants to look
2 at these bonus features that is going to be pure text
3 having nothing to do with the images and sort of the
4 indoctrination in naturism, I just think it's a waste
5 of the jury's time. I object.

6 THE COURT: I'm going to let him present it as
7 he wants to. I understand.

8 MR. DONNELLY: Thank you.

9 (End of sidebar conference.)

10 (Video played.)

11 Q. Mr. Silva, I'm now going to move to the previous
12 section. I'm now going to speed up this section.

13 THE COURT: We can't have you ask questions and
14 play the video at the same time. So stop it and
15 proceed. Unless it's played at a higher speed and the
16 video is off.

17 MR. MANN: I understand.

18 Q. I'm now going to play the video at a higher speed.

19 A. Thank you.

20 (Video played.)

21 Q. Mr. Silva, I'm now going to exit this disk.

22 A. Thank you.

23 MR. MANN: I'm returning Exhibit 1, and I'll now
24 ask for Exhibit 2.

25 Q. Mr. Silva, looking at Exhibit 2, what is the name

1 of that exhibit?

2 A. "V [REDACTED], Volume 1."

3 Q. Mr. Silva, how many disks are in that volume?

4 A. Two.

5 Q. Thank you.

6 THE COURT: Mr. Mann, if you're getting ready to
7 play this, we're getting ready to take a lunch break in
8 about ten minutes. Whenever there's a convenient point
9 to stop, let's stop.

10 MR. MANN: Wherever the Court wants me to, I'll
11 pause it. I'll stop.

12 And may the record reflect this is disk one of
13 the two disks.

14 (Video played.)

15 Q. I'm going to move this to a higher speed, okay,
16 Mr. Silva?

17 A. Thank you.

18 (Video played.)

19 MR. DONNELLY: Mr. Mann, can you tell me what
20 speed this is.

21 MR. MANN: I think four-speed. I'm not
22 positive.

23 MR. DONNELLY: Thank you.

24 THE COURT: Okay. Why don't we stop there. Is
25 that the end of the disk, the first disk?

1 MR. MANN: That is the end of the first disk,
2 that is correct, your Honor.

3 THE COURT: Ladies and gentlemen, let's take our
4 lunch break at this point. I want to remind you again
5 about my instructions to not have any conversations
6 about the case, not to do any research, not to expose
7 yourself to any information about the case. Keep in
8 mind if you're outside during the lunch hour to wear
9 those jurors buttons on the outside of your garment,
10 and we will reconvene the trial at 1:30.

11 So Charlie will show you out.

12 (Proceedings out of the presence of the jury as
13 follows:)

14 THE COURT: Is there another disk as part of
15 that exhibit?

16 MR. MANN: There is. So I took the disk out of
17 the player, and I'm returning to the clerk the exhibit
18 with both disks in it.

19 THE COURT: Okay. So we'll take our lunch
20 recess. Just so I understand what we're going to be
21 doing, what you're going to be doing, Mr. Mann, is
22 you're going to go through all the disks in this
23 manner? Is that the plan?

24 MR. MANN: That's right. Could I approach
25 briefly with Mr. Donnelly?

1 (Discussion off the record.)

2 (Lunch recess.)

3 THE COURT: All right. Counsel, are we ready to
4 bring the jury in?

5 MR. MANN: Yes, your Honor.

6 THE COURT: The plan remains the same?

7 MR. MANN: Yes. I was going to ask, Judge, do
8 you mind when I play this I step back after a while or
9 something?

10 THE COURT: You do what you need to do.

11 Bring the jury in.

12 (Proceedings in the presence of the jury as
13 follows:)

14 THE COURT: Welcome back, ladies and gentlemen.
15 Hope you had a pleasant lunch hour. I think we're
16 ready to proceed. Mr. Mann, I think, is proceeding
17 with the next video.

18 Mr. Mann, you may proceed.

19 MR. MANN: Thank you. I'd ask the clerk for
20 Exhibit 2, disk two.

21 Q. Mr. Silva, do you see that this is Exhibit 2, disk
22 two?

23 A. Yes, it is.

24 Q. Thank you. Mr. Silva, I'm going to speed this up.
25 Okay?

1 A. Thank you.

2 (Video played.)

3 Q. Mr. Silva, I'm going to try to speed it up a
4 little bit.

5 A. Thank you.

6 (Video played.)

7 Q. I'm going to move to the trailers now.

8 I'm going to speed this up.

9 A. Thank you.

10 Q. I'm going to remove this disk, Mr. Silva.

11 A. Thank you.

12 MR. MANN: I'm returning Exhibit 2 to the clerk.

13 I'll ask for Exhibit 3, please.

14 Q. Mr. Silva, you see this is Exhibit 3?

15 A. Yes, I do.

16 Q. Has two disks?

17 A. Two disks.

18 Q. Showing you Volume 2, disk one?

19 A. That's correct.

20 Q. I'm inserting that disk now. Mr. Silva, I'm going
21 to play this at a higher speed, okay?

22 A. Thank you.

23 (Video played.)

24 Q. Mr. Silva, I'm going to insert the second disk.

25 A. Thank you.

1 Q. I'm going to play that also at a higher speed,
2 sir.

3 A. Thank you.

4 (Video played.)

5 Q. Mr. Silva, I'm going to skip the history of
6 naturism, okay?

7 A. Yes.

8 MR. DONNELLY: Are they a different set or are
9 they cumulative?

10 MR. MANN: I don't know. If the Government
11 represents to me they're the same, I will skip the
12 trailers, too.

13 Q. I'm going to play them at a very high speed. I'm
14 also going to put that at a higher speed, okay,
15 Mr. Silva?

16 A. Thank you.

17 Q. See if I can speed it up a little bit more,
18 Mr. Silva.

19 A. Thank you.

20 MR. MANN: Returning Exhibit 3 and would ask for
21 Exhibit 4, please.

22 Q. Showing you Exhibit 4, do you recognize that? Is
23 that a two-disk exhibit?

24 A. Yes, it is.

25 Q. I'm going to put in this first disk, not the bonus

1 disk initially.

2 A. Okay.

3 Q. Mr. Silva, I'm going to play these again at a
4 higher speed.

5 A. Okay.

6 Q. Mr. Silva, I'm going to skip the video about
7 naturism, sir.

8 A. Thank you.

9 Q. I'm going to stick in the bonus disk, sir.

10 A. Thank you.

11 Q. I'm going to play that at a high speed, too, sir.

12 A. Thank you.

13 (Video played.)

14 MR. MANN: The Government pointed out to me,
15 thank you, that there's a third disk.

16 Q. You see this Bonus Disk 2?

17 A. Yes, I do.

18 Q. Thank you. I'll insert that now. Mr. Silva, I'm
19 going to play this at high speed again.

20 A. Thank you.

21 (Video played.)

22 MR. MANN: I'm now returning Exhibit 4 of all
23 three disks. I'll take Exhibit 5 now.

24 THE COURT: Mr. Mann and Mr. Donnelly, can you
25 just come up for a moment, please.

1 (Sidebar conference.)

2 THE COURT: How many disks total are there?

3 MR. MANN: Your Honor, I think I had 14 more
4 disks after lunch. We just finished Exhibit 4.

5 MR. DONNELLY: He's skipping the photo disk for
6 Count IV. That's Exhibit 4A.

7 MR. MANN: Is there a 4A? I missed it.

8 MR. DONNELLY: I should have made clear on the
9 last one, I'm just letting you know you're missing
10 something.

11 MR. MANN: I was doing them by number. I'll go
12 back to 4A.

13 MR. DONNELLY: My list here, Judge, is that the
14 next exhibit has two disks plus a photo DVD.

15 THE COURT: Then how many more do you have after
16 that?

17 MR. DONNELLY: Seven.

18 MR. MANN: If I play them at four-speed, they
19 get done pretty quickly.

20 THE COURT: I'd kind of like to discuss this
21 with you more, but I don't really want to do it with
22 the jury sitting in the box. So I'm going to have them
23 sent into the jury room for a few minutes. I think the
24 snacks will be here momentarily, because they're
25 scheduled to come at 3:00. Okay? So why don't you go

1 back, and we'll do that.

2 MR. MANN: Just go back to counsel table?

3 THE COURT: Yes.

4 (End of sidebar conference.)

5 THE COURT: All right. Ladies and gentlemen,
6 there's something I need to talk to the attorneys
7 about, and I don't want to keep you sitting in the jury
8 box. We're almost at the time for our afternoon break
9 so I'm going to send you to the jury room. The snacks
10 should be arriving momentarily.

11 So assuming that they do, we'll give you enough
12 time that you can have your snacks and a cup of coffee
13 and then have you return. So Charlie will show you
14 out. Just keep in mind all of my instructions.

15 (Proceedings out of the presence of the jury as
16 follows:)

17 THE COURT: You can step down to the table.

18 THE DEFENDANT: Thank you, your Honor.

19 THE COURT: Counsel can come back up.

20 (Sidebar conference.)

21 THE COURT: All right. I think I've reached a
22 limit on this, but before I pull the trigger on Rule
23 611 and say that I'm going to stop this, I want to give
24 you an opportunity to articulate why it would make any
25 sense to keep going. After watching how many disks,

1 five or six disks I think we've watched at this point,
2 it strikes me that there is just so much repetition,
3 the same kind of thing over and over that I can't
4 envision what you could possibly accomplish by showing
5 all of the rest of the disks in terms of either what
6 the jury would see or what your argument might be.

7 So I can't see it so I wanted to give you a
8 chance to explain it.

9 MR. MANN: The major point of my argument is
10 that these videos are boring, not lascivious; and that
11 viewed in their entirety, each disk, if you look at
12 each disk, the single word that leaps out is "boring."
13 I made an opening where I said they would see -- I
14 think I said most if not all, the majority of, I can't
15 remember the exact words I used, but basically said
16 that they would see an awful lot of these.

17 The problem is, Judge, that -- I'm happy to show
18 them at four-speed where it's taking about ten minutes
19 a disk, I think. I haven't timed it exactly because I
20 don't have a clock in front of me. I suspect it will
21 take about another hour-and-a-half to show the rest of
22 the disks at the speed that I'm doing them at. Some of
23 it is taking longer in the beginning because I showed a
24 lot of the first one at regular speed and then I showed
25 the history of naturalism at regular speed, but I

1 haven't played that again, Judge.

2 THE COURT: That's fine. I'm not complaining
3 about that.

4 MR. MANN: It seems to me if I'm going to make
5 an argument to the jury and in effect I almost force
6 myself to become -- I can't become a witness but yet
7 how can I represent to the jury what's in these disks
8 without having some record of it, Judge? I'm not
9 willing to rely on the excerpts the Government has
10 provided.

11 THE COURT: Well, we've gone way, way beyond
12 that. Basically, that's why I gave you the opportunity
13 to do it.

14 MR. MANN: And I appreciate that, but I relied
15 on the opportunity of -- I think that if I don't play
16 the rest of them -- playing them at four-speed is a
17 compromise for me because it is very fast, Judge. I
18 initially started this afternoon off at three-speed.

19 THE COURT: I haven't dictated what speed.

20 MR. MANN: No. I thought four-speed was more
21 appropriate after they've seen some of it. I'm content
22 to continue to go along at four-speed. If I don't go
23 along at four-speed, what happens is my argument to the
24 jury, I make my argument that all these videos are
25 boring, they show that they are repetitive and all

1 that. But the only basis for me making that argument
2 is that I've seen them, Judge.

3 THE COURT: No. I think actually you've proven
4 that point with what you've shown. We've watched how
5 many hours of these videos now?

6 MR. DONNELLY: I could be off one or two either
7 way, but I think there's a total of 15 disks.

8 THE COURT: Total.

9 MR. DONNELLY: So the Court understands, there's
10 11 disk exhibits. The last one, "P████ & C████'s
11 Bucharest," I think, there's three actual disks, one
12 main disk and two bonus ones, and then the Defendant
13 ordered a photo disk on top of it. So by my count,
14 we've gone through 8 of 15.

15 I neglected yesterday to cite also Rule 403
16 which says the Court can exclude evidence where it
17 needlessly wastes time or is the needless presentation
18 of cumulative evidence. I understand Mr. Mann's point
19 better now that he's explained it, but I think we've
20 reached that point.

21 THE COURT: One thing I'm struggling with is I
22 don't see how boring is a defense.

23 MR. MANN: The defense is not that it's just
24 boring. The defense is that it's not lascivious
25 because when you look at these things, they are boring.

1 They are not lascivious.

2 THE COURT: Boring is not part of the standard
3 or any of the factors --

4 MR. MANN: I can certainly argue to the jury
5 that when you take these things in context and that's
6 what the pattern -- I can get out the wording out of
7 the pattern instruction but it's something either in
8 content or in context, Judge.

9 For them to see them isolated, in fact I was
10 going to argue that excerpt -- I understand high speed
11 is not the same as regular speed, but I was going to
12 argue it's no more selective and maybe less selective
13 than using excerpts. The additional problem that
14 occurs to me, and I just am thinking out loud, is that
15 now I'm in a position where I presented the videos as
16 to some of the counts but not as to other counts, so I
17 have a fair argument with respect to the counts that
18 are covered by disks one through four.

19 THE COURT: I have to tell you, Bob, I'm not on
20 the jury, obviously, so I don't know how the jury sees
21 it, but I actually think for those counts that you've
22 shown the full videos for that the evidence is now
23 stronger for the Government in terms of the definition
24 of "lascivious exhibition" because there's more -- just
25 more examples of the exhibition.

1 MR. MANN: We recognized when we played these
2 videos that there was a risk that we're showing them
3 more images, so to speak. We understand that's a risk.
4 When I say "we," the defense. But I think when you
5 look at the disks as a whole, and I think you have to
6 look at at least the disks for each count as a whole, I
7 can't make an argument that you look at all six counts
8 together or all seven counts, but I can certainly make
9 an argument that you look at the disks that would
10 support Count I as a whole.

11 My view is that looked at as a whole they are
12 much more naturist than they are lascivious. You don't
13 get that all from the excerpts. And the only way I can
14 convey that is by playing it. I have zero faith that
15 anybody in this jury is going to ask to play these
16 videos while they're in the jury room. And even if
17 they do, my great fear, quite seriously, is the other
18 jurors will persuade them not to. I suspect that
19 nobody wants to look at these videos anymore.

20 THE COURT: So the naturist argument is what
21 goes to the factor of whether it's designed to elicit a
22 sexual response?

23 MR. MANN: It goes to whether it's lascivious,
24 Judge.

25 THE COURT: That's part of it, right?

1 MR. MANN: I mean, that's part of it but it's
2 also -- these nude pictures are nude pictures of
3 primarily boys often in very naturist settings. Some
4 of them are in the sleeping car in a train car. I
5 recognize that some are in a bedroom, Judge, but my
6 argument is that it's all boys horsing around, boys
7 playing around, not the lascivious exhibition of
8 genitals.

9 Now, the jury may not accept that. I realize
10 that, Judge. That's the argument. And there's no
11 context at all if they just see the excerpts.

12 I do want to put on the record that I think -- I
13 agree that I've played I believe it is eight disks. I
14 agree with Mr. Donnelly that my count is eight disks
15 right now. I'm willing to accept Mr. Donnelly's count
16 that that would leave seven more. That would probably
17 leave us about an hour-and-a-half more to play, Judge.
18 Unless somebody else can correct me, I think they're
19 taking about ten minutes a disk.

20 THE COURT: No. I think you're -- I'm hopeful
21 it's no more than that.

22 MR. MANN: I mean, I'm playing them all at
23 four-speed right now, Judge. And I do think it really
24 puts the defense at a disadvantage now if we don't get
25 to play them. I'm doing them with no commentary

1 basically except to establish what disks we're putting
2 in. And there's sort of a gap -- not sort of. There's
3 a huge gap in the defense case right now. I have
4 different arguments for different counts now if I do it
5 that way. I have to go back to the jury and sort of
6 say we'll place this in context, but I've got no
7 context for the ones -- and I'd have to double check my
8 notes how far Exhibit 4 goes as to which count it
9 covers. I would just have to compare my notes. It
10 would take me a moment to marry up the exhibits to the
11 counts, Judge.

12 THE COURT: Well, I'm also just worried about
13 the restlessness of the jury watching this on and on
14 and on.

15 MR. DONNELLY: You asked for suggestions
16 earlier, Bob. The only thing I can think of here, you
17 make a very cogent argument as always, do you have to
18 play every second? Can you play at a high speed for a
19 minute or two minutes? Everybody gets the general
20 picture.

21 MR. MANN: I am comfortable with a stipulation
22 that the trailers -- I think we can work out some sort
23 of stipulation --

24 THE COURT: The trailers are all repetitive.

25 MR. MANN: The trailers are repetitive and

1 nothing in the trailers that hasn't been shown reveal
2 anything new. I'm happy to make a stipulation like
3 that.

4 MR. DONNELLY: I don't understand that
5 stipulation --

6 THE COURT: One thing you could do is ask him,
7 you know, have you seen the trailers on all of these
8 films, are they basically the same as the earlier ones?

9 MR. MANN: I don't think he even knows, Judge.

10 THE COURT: Well, if he hasn't seen them, then
11 he wouldn't know, right?

12 MR. MANN: The last trailer is a few minutes,
13 Judge. I'm happy to stipulate away to the trailers. I
14 really am, Judge. I've taken out the history. We did
15 that once. I'm happy to get rid of the trailers if we
16 can reach some sort of stipulation.

17 THE COURT: All right. I guess I'll let you do
18 it.

19 MR. MANN: I feel like I have to do it.

20 THE COURT: We can go off the record, I guess.

21 (Discussion off the record.)

22 (End of sidebar conference.)

23 (Recess.)

24 THE COURT: Ready to bring the jury back?

25 MR. MANN: Yes.

1 THE COURT: All right. Charlie, let's bring
2 them in.

3 (Proceedings in the presence of the jury as
4 follows:)

5 THE COURT: All right. Ladies and gentlemen,
6 welcome back. So Mr. Mann is about to proceed with
7 showing the rest of the disks. I have consulted with
8 counsel and just for your benefit I will tell you that
9 this portion of the defense's case is going to last the
10 rest of today. We're going to finish the presentation
11 of these disks by 4:30 and then I'm going to let you go
12 for the day and then Mr. Mann will pick up with his
13 continued examination of the Defendant when we return
14 on Monday morning. All right?

15 Go ahead, Mr. Mann.

16 MR. MANN: Thank you.

17 Q. Exhibit 6 has two disks, right, sir?

18 A. Yes.

19 Q. Just to save time, I'm going to play the rest of
20 the disks at high speed, okay, Mr. Silva?

21 A. Yes, please.

22 Q. This is Disk 1.

23 (Video played.)

24 Q. Mr. Silva, I'm now going to insert Disk 2.

25 A. Thank you.

1 Q. Load the bonus features now, sir.

2 A. Thank you.

3 Q. You've seen the section previews?

4 A. Yes.

5 Q. You've seen the previews in these, right?

6 A. Yes.

7 Q. Are the previews about the same?

8 A. Yes.

9 Q. I'm going to skip the previews.

10 A. That would be fine.

11 MR. MANN: I'm going to return Exhibit 6 and ask
12 for Exhibit 8.

13 Q. Two disks again, sir?

14 A. Two disks.

15 Q. I'm going to put in Disk 1. Again I'm going to
16 continue to play these at high speed, sir.

17 A. Thank you.

18 Q. I've extracted Disk 1, Mr. Silva. I'm going to
19 insert Disk 2 of this exhibit. I'm going to skip the
20 history again.

21 A. Very good.

22 MR. MANN: Returning Exhibit 8. I'd ask for
23 Exhibit 9.

24 Q. Exhibit 9, two disks, sir?

25 A. Two disks.

1 Q. Starting Disk 1. I'm now starting Disk 2, sir.

2 A. Thank you.

3 MR. MANN: Still Exhibit 9.

4 MR. DONNELLY: Thank you.

5 MR. MANN: This is Disk 2 that I'm now inserting
6 of Exhibit 9.

7 Seems to be taking longer than normal. I'm
8 going to try to remove the disk and reinsert the disk.

9 THE COURT: Maybe that disk isn't working
10 properly, Mr. Mann. Perhaps you can move on.

11 MR. MANN: I'm going to return Exhibit 9 to the
12 clerk and note that I have not played Disk 2 and ask
13 the clerk if I can have Exhibit 10.

14 Q. Mr. Silva, I'm showing you Exhibit 10. You see it
15 has one, two -- two disks, sir?

16 A. Two disks.

17 Q. I'm going to play the first disk.

18 (Video played.)

19 Q. We'll skip previews again, Mr. Silva.

20 A. Yes.

21 Q. We're obviously going to skip the history of
22 naturism again.

23 A. Yes.

24 Q. I'm going to put in a second disk labeled
25 "Supplemental Material," sir.

1 A. Thank you.

2 Q. Mr. Silva, we're going to skip the next two items
3 we discussed.

4 A. Very good.

5 MR. MANN: Returning Exhibit 10 with two disks.
6 I'd ask for Exhibit 11, please.

7 Q. Mr. Silva, I want to show you this. It appears to
8 have one disk in it.

9 A. Right.

10 Q. I'll now play the deleted scene now, sir, at the
11 same high speed.

12 A. Thank you.

13 Q. Just like the previews, the trailers are generally
14 the same for all these, aren't they?

15 A. I believe so.

16 Q. You haven't seen them all but you'd say they're
17 generally the same?

18 A. I believe so.

19 Q. I'm not going to play them all.

20 MR. MANN: Let me return Exhibit 11. I'd ask
21 for Exhibit 5 now.

22 Q. Showing you Exhibit 5, it's a DVD, sir?

23 A. Okay.

24 THE CLERK: I don't think we can play that on
25 the DVD player.

1 MR. MANN: It has to be played on a computer?

2 May I confer with Government counsel for just a
3 second?

4 THE COURT: Yes.

5 (Pause.)

6 THE COURT: Why don't you play the next thing
7 and let the Government figure out if that can be done.

8 MR. MANN: I think if we go back to Disk 2 of
9 Exhibit 9 is the only one that didn't work. That's the
10 only other video that I have to do, Judge.

11 THE COURT: All right.

12 Q. This is Disk 2 of Exhibit 9, sir?

13 A. Yes.

14 Q. I'm going to play this at high speed again, sir.

15 A. Thank you.

16 (Video played.)

17 THE COURT: Didn't you already play this?

18 MR. MANN: This is Disk 2. I played Disk 1,
19 Judge. I'll double check. My notes were Disk 1 played
20 but Disk 2 did not.

21 (Video played.)

22 MR. MANN: I'm returning Exhibit 9, both disks
23 to the clerk.

24 Could I speak to the Government for one second,
25 Judge.

1 (Pause.)

2 MR. MANN: So the Government now has Exhibit 5,
3 Judge, which I would have permission to publish to the
4 jury in the fashion similar to what we've been doing in
5 high speed.

6 THE COURT: Fine.

7 MR. MANN: I'll return Exhibit 5 and ask for
8 Exhibit 7.

9 (Video played.)

10 MR. MANN: I'm returning Exhibit 7 to the clerk.
11 I believe that completes the video and image evidence
12 the defense intends to present with respect to the
13 Government's documents.

14 THE COURT: So that's it with respect to all of
15 the video and --

16 MR. MANN: All the images that the Government
17 has presented for evidence.

18 THE COURT: Would counsel just come up for a
19 moment, please.

20 (Side bar conference off the record.)

21 THE COURT: Ladies and gentlemen, having
22 consulted with counsel, I think what makes the most
23 sense at this point is to stop for the day and let you
24 go home now. Mr. Mann has a full examination of the
25 witness, the Defendant, that he wishes to do but I

1 think it's best if we start that fresh on Monday
2 morning so that we don't end up just chopping it off at
3 some random point. There's some things I need to do
4 with the attorneys with respect to the charge on the
5 law, which we do in every case, and I can utilize the
6 rest of the afternoon to do that and don't have to keep
7 you here. I'm going to send you home.

8 I'm going to remind you of all the instructions
9 I mentioned previously. I do recognize it's a burden
10 on you to not talk about the case. I do recognize
11 that. In fairness to the Defendant as well as the
12 Government, I have to ask you to resist from that
13 discussion about the case. I also reiterate my
14 instruction not to do any research of any kind about
15 the case that has come up as well as not watch or
16 listen or read anything regarding the case in any
17 medium at all.

18 So with that I'm going to wish you a good
19 weekend and we'll see you Monday morning. We'll begin
20 at 9:00 a.m.

21 Thank you.

22 (Proceedings out of the presence of the jury as
23 follows:)

24 THE COURT: Counsel, I'll see you upstairs and
25 take five or ten minutes.

1 MR. MANN: Thank you.

2 THE COURT: Thank you.

3 (Court concluded at 4:10 p.m.)

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C E R T I F I C A T I O N

I, Anne M. Clayton, RPR, certify that the foregoing is a true and correct copy of the transcript originally filed with the clerk on September 16, 2014, and incorporating redactions of personal identifiers requested by the following attorney of record: Robert B. Mann, in accordance with the Judicial Conference policy. Redacted characters appear as a black box in the transcript.

/s/ Anne M. Clayton

Anne M. Clayton, RPR

October 16, 2014

Date